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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE; NEBRASKA CATHOLIC CONFERENCE; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; GREEK ORTHODOX ARCHDIOCESE OF AMERICA; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD; AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Representatives of diverse religious communities unite here across denominational lines as *amici curiae* on behalf of Petitioners to demonstrate that Nebraska may, as it has here,

prohibit the killing of partly-born children.[1] As religious communities, many of these *amici* have worked to restore constitutional protection for life in the United States. As much as we continue to work for reconsideration of this Court's abortion jurisprudence, this case does not require the Court to reevaluate its earlier abortion decisions, for the prohibited conduct falls outside the bounds established under those decisions. The challenged Nebraska law reasonably and constitutionally advances traditional state interests in protecting life and regulating the medical profession. Individual statements of interest follow.

The United States Catholic Conference is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Catholic Bishops of Nebraska are, in addition, members of the Nebraska Catholic Conference. Both Conferences are vehicles through which the Bishops can speak cooperatively and collegially on matters affecting the Catholic Church, its people, and society in general. The Conferences advocate and promote the pastoral teaching of the Church on diverse issues, including the protection of human rights and the sanctity and dignity of human life. The United States Catholic Conference and Nebraska Catholic Conference have supported initiatives in Congress and in the Nebraska Legislature, respectively, to prevent the killing of partly-born infants.

The Ethics and Religious Liberty Commission is the moral concerns and public policy agency of the Southern Baptist

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[1]Letters from all parties consenting to the filing of this brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

Convention, the Nation's largest Protestant denomination, with over 16 million members in 40,000 autonomous local churches. The Commission is charged with addressing public policies affecting the sanctity of human life, ethics, and religious liberty.

The Greek Orthodox Archdiocese of America is a nonprofit corporation organized under the laws of the State of New York. It includes over 500 parishes serving a constituency of approximately one million people. In official resolutions, the Greek Orthodox Archdiocese is committed to defending religious freedom and the right to life as treasured gifts of God. It seeks to advocate positions consistent with these resolutions and with its teachings for nearly 2000 years by joining in the filing of briefs in important litigation such as the present case.

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association with headquarters in Salt Lake City, Utah. Church membership exceeds 11 million, with more than 25,000 congregations throughout the world. Church membership in Nebraska exceeds 18,000, with 340 local congregations. The Church of Jesus Christ of Latter-day Saints believes in the sanctity of life and denounces partial birth abortion.

The Lutheran Church-Missouri Synod (the "Synod") is the second largest Lutheran denomination in North America. It is composed of approximately 6,000 member congregations which, in turn, have approximately 2,600,000 individual members. In 1998, in its most recent convention, the Synod re-affirmed its belief in the sanctity of human life, including "unborn children, whom God has woven together in their mother's wombs (Psalm 139:13-16)." It was resolved that the Synod "denounce partial-birth abortion as a barbaric procedure."

The National Association of Evangelicals ("NAE") is a

nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom and the right to life as precious gifts of God and vital components of the American heritage.

SUMMARY OF ARGUMENT

In its most recent substantive ruling on the abortion issue, this Court confirmed that not all abortions (let alone all procedures that might be characterized as abortion) are entitled to constitutional protection. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), reaffirmed that abortions can be prohibited after viability except in those rare circumstances where maternal life or health is endangered. *Casey* left the states free to advance their interests in protecting unborn human life, preserving a woman's health, ensuring that her decision to have an abortion is informed, and regulating and maintaining the integrity and ethics of the medical profession.

Shortly after *Casey* was handed down, it was announced that a handful of physicians were performing a procedure in which all but the head of a child is delivered before his or her life is taken. In such cases, death is caused by forcing scissors into the base of the skull of the partly-born child and suctioning out brain matter. The procedure was claimed by its practitioners to be an innovation. Other physicians and commentators were not so sanguine. A description of the procedure shocked the public, whose representatives in Congress and in state legislatures, including Nebraska, moved to ban it.

In prohibiting the killing of partly-born children, the Nebraska Legislature acted reasonably and in a manner

consistent with this Court's decisions. Those decisions have involved the taking of a child's life *in utero*. Abortion that this Court has held to be constitutionally protected has never been understood by the Court or the public to include taking the life of a partly-born child. The challenged statute prohibits a new procedure which this Court has, until now, never considered. It is called "abortion" because it prevents a completed live birth, but it is in fact an extension of abortion as that procedure has traditionally been understood. The procedure is more like infanticide than abortion. To strike down the Nebraska statute would require an extension of the *Roe/Casey* framework that is unwarranted by constitutional text and existing precedent.

Even if the Court were to consider whether the prohibited conduct should be included within the *Roe/Casey* framework, the considerations identified by the *Casey* plurality would not require extending constitutional protection to that conduct. The "rule of *stare decisis*," upon which the *Casey* plurality relied, 505 U.S. at 846, is not at issue here because the killing of partly-born children is new to both law and medicine. Similarly, "principles of institutional integrity," *Casey*, 505 U.S. at 845, another important concern of the *Casey* plurality, would not be undermined by allowing Nebraska to prohibit the killing of partly-born children when it seems clear that neither the Constitution nor this Court's precedents prevent Nebraska from enacting that prohibition.

Even if the *Roe/Casey* framework were to be applied, the Nebraska statute should be upheld because it furthers legitimate state interests that *Casey* recognized. The statute halts a practice that borders on, if it does not constitute, infanticide, for the child's life is taken when he or she is mere seconds and inches from complete delivery. The statute advances the State's paramount interests in protecting human life and erecting a barrier against outright infanticide. The statute also protects the

integrity and ethics of a profession committed to healing. Indeed, past experience with abortion suggests that if a license to heal became a license to kill partly-born children, such deadly acts would become part of mainstream medicine, eventually forcing conscientious physicians either to conform or to withdraw from areas of practice in which such conduct is expected. Finally, there is substantial and credible evidence that the Nebraska statute poses no risk to women's health. Indeed, many physicians have suggested that the banned procedure itself poses a serious risk to women.

For all these reasons, the Nebraska Legislature acted well within constitutional parameters when it enacted the statute challenged here.

ARGUMENT

This case involves a practice that, since it was announced in 1992, has justifiably horrified the American public. The announced "innovation" in abortion practice, the killing of partly-born children[2] by a handful of physicians, led

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[2]The news was unsettling to individuals on both sides of the abortion debate. Senator Daniel Patrick Moynihan (D. N.Y.) observed that the prohibited conduct "is as close to infanticide as anything I have come upon." Quoted in Nat Hentoff, "Close to Infanticide," *The Washington Post* (Aug. 30, 1996) at A31; *see also* M. LeRoy Sprang, M.D. & Mark G. Neerhof, D.O., "Rationale for Banning Abortions Late in Pregnancy," 280 J. Am. Med. Ass'n 744, 745 (Aug. 26, 1998) ("many otherwise prochoice individuals have found [this procedure] too close to infanticide to ethically justify its continued use"). One physician testified before Congress that "when I describe[d] the procedure of partial-birth abortion to physicians and lay persons who I know to be prochoice, many of them were horrified to learn that such a procedure was even legal." *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 39 (June 15, 1995) (statement of Pamela Smith, M.D.).

to the approval of prohibitions by Congress[3] and a majority of state legislatures.[4] Judges, though they disagree in their evaluation of these statutes, have universally shared in the public's and legislatures' revulsion to the prohibited conduct.[5]

The constitutional challenge to the Nebraska statute and similar legislation is a truly extraordinary chapter in American law. In cases such as this one it is contended that the killing of partly-born children is not only a public *good* -- a claim that would seem to turn any ordinary understanding of the common good on its head -- but a constitutional *right* with which the state may not interfere. That Respondent or anyone would seriously

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[3]The Partial-Birth Abortion Ban Act, S. 939, 104th Cong., was approved by the Senate on December 7, 1995, approved by the House on March 27, 1996, and vetoed by the President on April 10, 1996. The Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong., was approved by the House on March 20, 1997, approved by the Senate with an amendment on May 20, 1997, and the House approved the Senate version on October 8, 1997; that bill was vetoed by the President on October 10, 1997. Thus far, congressional efforts to override the President's veto have passed in the House but narrowly failed in the Senate. On October 21, 1999, the Senate passed the Partial-Birth Abortion Ban Act of 1999, S. 1692, 106th Cong.

[4]*See* note 8, *infra* (listing statutes).

[5]*Evans v. Kelley*, 977 F.Supp. 1283, 1319 n.38 (E.D. Mich. 1997) ("[T]he intact D&E procedure is gruesome and inhumane and society, through its elected representatives, should be able to circumscribe its utility. Indeed, even Plaintiffs' expert, Dr. Doe, testified that the intact D&E is a particularly hideous procedure"); *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 213 (6th Cir. 1997) (Boggs, J., dissenting) (stating that the prohibited procedure is "particularly offensive"), *cert. denied*, 118 S.Ct. 1347 (1998); *Midtown Hospital v. Miller*, 36 F.Supp.2d 1360, 1366 (N.D. Ga. 1997) (characterizing the prohibited procedure as "particularly gruesome and inhuman").

dispute that states have the authority to protect children mere seconds and inches from full delivery[6] from the brutal and violent killing that Nebraska here has chosen to prohibit is perhaps a sign of just how far from a correct interpretation of the Constitution proponents of this procedure are willing to lead this Court.

I. The Killing of Partly-Born Children is Not Constitutionally Protected Under *Roe*, *Casey*, or Other Decisions of this Court.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court indicated that it was protecting a limited constitutional right -- that a woman could choose whether to terminate or continue a pregnancy without undue interference by the state. *See Maher v. Roe*, 432 U.S. 464, 473-74 (1977). Although it placed this right within a constitutional framework, this Court nevertheless concluded that "this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. at 154. Rather, it is a decisional right only, and abortion practices have been protected by this Court only when inexorably linked to the decision whether to continue a pregnancy, something which cannot be said of the conduct at issue here.

In 1992, this Court in *Casey* confirmed the limitations on constitutional abortion and the inherent authority of legislatures to draw appropriate lines. *Casey* reaffirmed the right of women to have an abortion before viability and, after viability, in those

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[6] *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 39 (June 15, 1995) (testimony of Pamela Smith, M.D.) (testifying that the prohibited conduct "is literally seconds and inches away from being classified as a murder by every State in the Union").

"rare circumstances" in which an abortion is necessary to preserve the mother's life or health. 505 U.S. at 851, 879. Seven justices, however, explicitly rejected the expansive jurisprudence which had developed in the years following *Roe*. *Id.* at 869-78 (plurality opinion); *id.* at 944 (Rehnquist, C.J., joined by White, Scalia, Thomas, JJ.) (concurring in the judgment in part, dissenting in part). The plurality opinion in *Casey* returned to the states the power to regulate abortion and to protect unborn human life throughout pregnancy as long as the state did not "unduly burden" the decision whether to have an abortion before viability. Against this background, it seems patent that simply labeling an action "abortion" does not trigger constitutional protection. Numerous practices, and even some actions properly denominated "abortion," fall outside the *Roe/Casey* constitutional box. The Nebraska statute does not affect the decision to have an abortion, nor does it involve the *in utero* destruction of human life. Nor does it involve a method that has been part of abortion practice. To affirm the lower courts' decision to strike down the statute would therefore involve this Court in constitutionalizing a new and different type of conduct. It would be both a repudiation of *Casey* and a return to the absolutist approach that seven members of this Court rejected in that case.

Neither *Roe* nor *Casey*, nor any other decision of this Court, forbade legislatures to prohibit the killing of children who are partly born. *Roe* speaks directly to this point. All that was challenged in *Roe* was a Texas ban on abortion *before* the birth process begins. *Roe* explicitly exempted from its consideration a Texas law that made it unlawful "during parturition of the mother [to] destroy the vitality or life in a child in a state of being born and before actual birth...," 410 U.S. at 117 n.1, a prohibition which came under no attack in *Roe*, and which continues to this day following its recodification in 1973.

Tex. Rev. Civ. Stat. art. 4512.5.[7] *Roe*, then and now, has been understood by this Court and the American public as relating to the taking of life *in utero*.

No subsequent decision of this Court has ever extended *Roe* to encompass the death of partly-born children.[8] Indeed,

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[7]Legal scholars on all sides of the abortion issue have recognized that *Roe* does not address the killing of partly-born children. *See, e.g.*, Letter of Nov. 6, 1995 from Harvard Law Professor Laurence Tribe to Senators Barbara Boxer and Edward Kennedy, at 2 (stating that the Supreme Court "has never directly addressed a law quite like [the Partial-Birth Abortion Ban Act]"), quoted in 145 Cong. Rec. S12990 (Oct. 21, 1999); *The Origins and Scope of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (April 22, 1996) (testimony of Harvard Law Professor Mary Ann Glendon) (stating that "*Roe* says nothing about the killing of a baby during delivery"). In a joint letter to members of the United States Senate, over 60 law professors, conceding that "we are of different minds on various aspects of the abortion issue," wrote that "we are unanimous in concluding that such a ban [on partial birth abortions] is constitutional," and that such a ban falls "entirely outside the legal framework established in *Roe v. Wade* and *Planned Parenthood v. Casey*." Letter of May 8, 1997, to U.S. Senators, signed by 63 Professors of Law, reprinted at 143 Cong. Rec. S4706 (May 20, 1997). *See also* H.R. Rep. No. 105-24, at 15 (1997) (stating that "the Court has never addressed the constitutional status of those who are in the process of being born").

[8]Most state laws that ban such killing refer to it as "partial birth abortion." Ala. Code §§ 26-23-1 to 26-23-6; Alaska Stat. § 18-16-050; Ariz. Rev. Stat. § 13-3603.01; Ark. Code Ann. § 5-61-201 to 5-61-204; Fl. Stat. §§ 390.011, 390.0111(5); Ga. Code Ann. § 16-12-144; Idaho Code § 18-613; Ill. Comp. Stat. ch. 720, §§ 513/1 to 513/99; Ind. Code §§ 16-18-2-267.5, 16-34-2-1(b), 16-34-2-7(d); Iowa Code § 707.8A; Kan. Stat. Ann. § 65-6721; Ky. Rev. Stat. Ann. §§ 311.595(3), 311.720(7), 311-765, 311-990(11); La. Rev. Stat. Ann. § 1299.35.16; Mich. Comp. Laws §§ 333.17016, 333.17516; Miss. Code Ann. §§ 41-41-71 to 41-41-73; Mont. Code Ann. §§ 50-20-102(2)(e), 50-20-401; Neb. Rev. Stat. §§ 28-326(9), 28-328, 71-148(15); N.J. Stat. Ann. §§ 2A:65A-5 to 2A:65A-7; Ok. Stat. tit. 21, § 684; R.I. Gen. Laws §§ 23-4.12-1 to 23-4.12-6; S.C. Code Ann. § 44-41-85; S.D. Codified Laws §§ 34-23A-27 to 34-23A-32; Tenn. Code Ann. § 39-15-209; Utah Code Ann. § 76-7-310.5; Va. Code Ann. § 18.2-74.2; W.Va. Code §§ 33-42-3, 33-42-8; Wis. Stat. §§ 895.038, 940.16.

Other States use another term, such as "infanticide" or "feticide," in addition to, or in lieu of, partial birth abortion. Mo. Rev. Stat. § 565.300 (using the term "infanticide" to refer to the killing of a fully- or partly-born infant); La. Rev. Stat. Ann. § 32.9 (using the term "feticide" as designation of subpart, "partial birth abortion" as name of procedure); N.D. Cent. Code §§ 14-02.6-01 to 14-02.6-03 (making it unlawful to "intentionally cause[ ] the death of a living intact fetus while that living intact fetus is partially born," but using the term "partial birth abortion" as designation of chapter). The procedure is sometimes referred to as dilation and extraction (D&X), or intact dilation and evacuation (intact D&E).

Its name does not change what it is. The prohibited conduct is a new form of killing that takes place when a child is inches from full delivery, unlike any other procedure considered in this Court's abortion decisions. The Nebraska Legislature called it "partial birth abortion," as, for the sake of convenience, will we.

[9]Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortion" (1992), reprinted in 139 Cong. Rec. E1092, 1993 WL 135664 (Apr. 28, 1993), and *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*,

Casey strengthens the case for upholding the Nebraska statute. Seven justices in *Casey* voted either to overrule *Roe*, 505 U.S. at 944 (Rehnquist, C.J., White, Scalia, and Thomas, JJ.), or to reaffirm its "essential holding" based on *stare decisis* and "principles of institutional integrity." *Id.* at 845-46 (O'Connor, Kennedy, and Souter, JJ.). The killing of partly-born children, however, is entirely new from the standpoint of both medicine and law. The procedure was announced as an "innovation" in a paper presented by Dr. Martin Haskell to the National Abortion Federation Risk Management Seminar in September 1992.[9] The abortion industry initially denied that this procedure

ever happened, then admitted that it happened, though rarely, and finally argued (as in this case) that it is constitutionally protected.[10]

Because of its novelty, no settled expectations have arisen concerning it. No member of this Court -- in *Roe*, *Casey*, or any other case -- has ever expressed an intent to apply *Roe* to partly-born children. Because the Court comes to the question for the first time, *stare decisis* does not apply. Similarly, "principles of institutional integrity" (*Casey*, 505 U.S. at 845) are not threatened by refusing to expand *Roe* to invalidate laws like Nebraska's, for neither the Constitution nor the Court's precedents restrict or even address the power of states to prohibit the killing of partly-born children.

A fresh examination of the question shows that the challenged Nebraska statute easily passes constitutional muster. The prohibited conduct clearly fails to satisfy the two tests for substantive due process protection that this Court reiterated just three Terms ago in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

First, it is patently absurd to contend that killing a partly-born child is "deeply rooted in this Nation's history and

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104th Cong. 15-21 (June 15, 1995).

[10] *See, e.g.*, H.R. Rep. No. 105-24, at 5 (1997) (opponents of federal ban "argue[d] that the partial-birth abortion method does not exist," and then claimed that the procedure was "used rarely"); Diane M. Gianelli, "Shock-Tactic Ads Target Late-Term Abortion Procedure," Am. Med. News at 3 (July 5, 1993) (quoting National Abortion Federation claims that the unborn child is "dead 24 hours before the ... procedure is undertaken"), reprinted in *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 9-11 (June 15, 1995).

tradition," as would be necessary to render it subject to constitutional protection. *Glucksberg*, 521 U.S. at 720-21. No state has ever approved the intentional killing of partly-born children. Indeed, news of this procedure produced near-universal shock among the Nation's policy makers and the public. There is nothing to suggest that the American public or the citizens of Nebraska failed to understand, or were insensitive to, the Nation's history and traditions when they acted through their elected representatives to ban such conduct.

Second, when subject to the "careful" and "precise" description mandated by *Glucksberg*, 521 U.S. at 721-23, it is apparent that the conduct Nebraska prohibits -- whether labeled "abortion" or "infanticide" -- cannot fairly be swept into the category of abortions to which this Court has given constitutional protection. In the first place, the statute does not impede the decision whether to terminate a pregnancy by abortion. Second, the prohibited conduct goes substantially further than, and differs in important respects from, the destruction of children *in utero* that the Court considered in *Roe* and *Casey*. The child is far closer to complete delivery; it has partly emerged from the mother's body; indeed, delivery is all but complete.[11]

The state also has a "legitimate moral interest" in prohibiting the killing of *partly*-born children. *Planned Parenthood v. Doyle*, 162 F.3d 463, 477 (7th Cir. 1998) (Manion, J., dissenting), *vacated*, 195 F.3d 857 (7th Cir. 1999).

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[11] The child's near complete delivery is illustrated by sketches of breech delivery and partial birth abortion reprinted in the Congressional record. *See The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 85-94 (Nov. 17, 1995); *Partial-Birth Abortion: The Truth: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 56 (March 11, 1997).

That interest is not vitiated by the existence of equally gruesome methods of killing *wholly unborn* children to which this Court has accorded constitutional protection.[12] *Id.* To say there is no "moral difference" between abortion procedures the Court has deemed constitutionally protected, on the one hand, and the killing of partly-born children on the other, *Doyle*, 162 F.3d at 470, or that there is "[n]o reason of policy or morality" to permit one and forbid the other, *Hope Clinic v. Ryan*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, C.J., dissenting), *pet. for cert. filed*, Nos. 99-1152, 99-1156, 99-1177 (U.S. Jan. 10 and 14, 2000), is to displace without constitutional warrant a legitimate legislative judgment of the people of Nebraska. *Doyle*, 162 F.3d at 477 (Manion, J., dissenting) ("the court [of appeals] overextends when it concludes that there is no moral difference between partial birth abortion and other abortion procedures.... That is a decision for Wisconsin to make").[13]

Nebraska's moral interest is not only "legitimate," but extraordinarily compelling.[14] What is at stake in this case is the

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[12]By analogy, while this Court has not declared capital punishment unconstitutional, it agreed earlier this Term to hear a Florida case involving a prisoner's Eighth Amendment challenge to a sentence of death by electrocution, *Bryan v. Moore*, 120 S.Ct. 394 (1999) (granting writ of certiorari), later dismissed when Florida amended its law to permit death by other means. *Bryan v. Moore*, 120 S.Ct. 1003 (2000) (dismissing writ of certiorari as improvidently granted).

[13]Whether procedures other than partial birth abortion may constitutionally be regulated by the Nebraska Legislature is irrelevant to the question whether it may regulate, or prohibit, partial birth abortion. A legislature "may take one step at a time," *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955), "select[ing] one phase of one field and apply[ing] a remedy there, neglecting the others." *Id.*

[14]Physicians have noted the "iron[y] that the pain management practiced for an intact D&X on a human fetus would not meet federal

life of a child. Few interests could be more deserving of the law's protection. Few things could be more suggestive of who we are as a Nation than our efforts to protect the innocent lives of children, or our failure to do so. The Constitution does not forbid such legislative efforts even when the child is not fully born. Surely this Court would not conclude, for example, that a child fully born save for a foot or hand is beyond the legitimate power of the legislature to protect. By the same token, the Constitution cannot fairly be read to forbid the Nebraska Legislature to prohibit the killing of children who are substantially born. Constitutional abortion does not embrace such conduct.

II. Consistent With *Casey*, the Nebraska Statute Serves the State's Legitimate Interests in Protecting Human Life and Regulating, and Preserving the Integrity and Ethics of, the Medical Profession.

A. Protecting Human Life

Decisions of this Court acknowledge the state's paramount and unqualified interest in protecting human life. Twice in the last decade the Court has given significant recognition to that interest, first when it upheld a state's heightened evidentiary standard for decisions to discontinue life-sustaining treatment, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), and again when it upheld state

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standards for the humane care of animals used in medical research." Sprang & Neerhof, *supra* note 2, at 745. Quoting prior testimony of a professor of pediatrics and anesthesia, one witness informed the Nebraska Legislature that a partial birth abortion, "if it was done on an animal ..., would not make it through the institutional review process. The animal would be more protected than the child is." Nebraska Committee on Judiciary, Hearing Transcript at 67, Hearing on LB 23, 167 & 217 (Feb. 12, 1997).

laws prohibiting physician-assisted suicide. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

Seven justices in Casey acknowledged that a state's interest in protecting human life gives it the power to regulate abortion beyond what the Court had allowed in the years between *Roe* and *Casey*. The plurality opinion in *Casey* was an explicit attempt to correct post-*Roe* cases that the plurality said had given inadequate weight to the state's interest in protecting life. 505 U.S. at 846, 870-76. If, as is true under *Casey*, states are not required to remain uninterested in protecting the life of a child *in utero*, they certainly have the power to protect children whose emergence from the mother is nearly complete.

Furthermore, the state may reasonably conclude that killing a partly-born child is a significant step toward, if it does not constitute, a form of infanticide, and constitutionally may act to prevent such conduct as a bulwark against outright infanticide. Credible reports of outright infanticide have surfaced that give legitimacy to these concerns,[15] and Nebraska legislators were aware of (and alarmed by) the resemblance between partial birth abortion and outright infanticide.[16]

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[15] *E.g.*, Tim Swarens, "Live Birth Shocked a Nurse," *The Indianapolis Star* (Dec. 3, 1999) (setting out the report of an employee of a company that collects fetal tissue that a physician "killed the babies after they were born"); James Tunstead Burtchaell, RACHEL WEEPING 288 (1982) (doctors charged with manslaughter following infant deaths allegedly caused by strangulation or failure to provide care following birth). *See* Brief *Amicus Curiae* of Family Research Council (documenting other reported instances of infanticide).

[16] Nebraska Senator David Maurstad stated: "If there is any action that comes closer to infanticide, I don't want to know of it.... I propose to the [Judiciary] [C]ommittee that an abortion procedure providing for the near

Because killing a *fully-born* infant would indisputably rob the newborn child of the natural and constitutional right of every human being to live, the State is warranted in erecting the highest possible fence to prevent it.[17] There is nothing in the text or values of the Constitution to prevent Nebraska from doing this. The State may draw a hard line between abortion that this Court has held to be constitutionally protected on the one hand, and conduct that approaches or constitutes infanticide on the other. *Cf. Quill*, 521 U.S. at 800-08 (holding that state legislatures constitutionally may draw a bright line between withdrawing treatment and assisting a suicide).

Whether or not partly-born children are constitutional persons -- a question this Court declined to consider in its order granting certiorari in this case -- need not be resolved for this Court to conclude that the Constitution permits States to forbid the intentional destruction of partly-born children. Put another

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birth of a child followed by its extinction should not be permitted in the state of Nebraska." Nebraska Committee on Judiciary, Hearing Transcript at 48, Hearing on LB 23, 167 & 217 (Feb. 12, 1997). Nebraska Senator Kate Witek stated that "the child subjected to a partial birth abortion is merely inches away from the full protection of homicide laws in all 50 states." *Id.* at 50. A committee witness agreed that the conduct at issue is "four-fifths infanticide." *Id.* at 65. Similar concerns were expressed during the floor debates in the Nebraska Legislature. *E.g.*, Transcript of Proceedings of the Nebraska Legislature at 3958 (Apr. 11, 1997) ("What LB 23 does prevent is near infanticide"); *id.* at 6766 (May 14, 1997) (the procedure "is much too close to infanticide").

[17] Disturbingly, arguments in favor of the direct killing of newborn infants have been made (and are being taken seriously) in some academic circles. *E.g.*, Peter Singer, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 128-31, 210-17 (1994); Peter Singer, "Sanctity of Life or Quality of Life?," 72 Pediatrics 128-29 (July 1983); Michael Tooley, ABORTION AND INFANTICIDE (1983); H. Tristram Engelhardt, "Ethical Issues in Aiding the Death of Young Children," in Marvin Kohl (ed.), BENEFICENT EUTHANASIA 188 (1975).

way, the Constitution does not *require* States to treat partly-born children as non-persons. At that stage when the child is neither fully in the womb nor fully delivered, there is nothing in the Constitution or in this Court's decisions that would rob states of the discretion to vindicate their strong interest in protecting vulnerable human life.

B. Protecting the Integrity and Ethics of the Medical Profession

The state has "an interest in protecting the integrity and ethics of the medical profession." *Glucksberg*, 521 U.S. at 731; *see also Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-12 (1935).[18] The authority to license and regulate the practice of medicine is a "vital part of a state's police power." *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). A licensed physician has no right to practice medicine according to his or her own unfettered judgment. *Whalen v. Roe*, 429 U.S. 589 (1977); *see also Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) (observing that "there is no right to practice medicine which is not subordinate to the police power of the states").

The state's authority to regulate the medical profession does not evaporate once the subject turns to abortion. *Roe* itself recognized that the state may enact regulations to protect medical standards. *Roe v. Wade*, 410 U.S. at 155, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428-29 (1983). States may prohibit abortions by persons not licensed to practice medicine. *Mazurek v. Armstrong*, 520 U.S. 968

[18]This interest is one upon which courts frequently rely in resolving disputes about whether to provide or discontinue life-sustaining medical treatment. *Matter of Conroy*, 486 A.2d 1209, 1223 (N.J. 1985), and cases cited therein.

(1997); *Connecticut v. Menillo*, 423 U.S. 9 (1975). States may require that women seeking an abortion be given certain information by their physician, *Casey*, 505 U.S. at 881-87, as is the case with any surgical procedure.

However, a practice that borders on, if it does not constitute, infanticide threatens dramatically to reconstitute the ethic underlying medicine. Killing a partly-born child contradicts the duty of the physician as healer. Physicians must not be killers. *Glucksberg* and *Quill* both upheld this basis for the state's regulatory authority. *Glucksberg*, 521 U.S. at 731; *Quill*, 521 U.S. at 794. A June 1997 fact sheet issued by the American Medical Association's ("AMA") Board of Trustees states that partial birth abortion "is ethically wrong."[19] AMA President Daniel H. Johnson, Jr., M.D., wrote that "the partial delivery of a living fetus for the purpose of killing it outside the womb is ethically offensive to most Americans and physicians." *The New York Times*, May 26, 1997 (letter to the editor). Former Surgeon General C. Everett Koop agreed, concluding that partial birth abortion "cannot and should not be considered 'medicine' by any stretch of the imagination." Letter of June 13, 1997, from C. Everett Koop, M.D., to Mark A. Levine, Chairman, Reference Committee B, American Medical Association.

Past experience suggests that if physicians were given a license to kill partly-born children, it would have a corrosive effect on medicine and medical ethics. It is instructive on this

[19]The AMA fact sheet states: "The procedure is ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed *outside* the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." AMA Board of Trustees Fact Sheet on H.R. 1122, at 1 (June 1997) (original emphasis).

point to consider how the abortion license has led to attempts to coerce physicians and hospitals to perform abortions over their moral and ethical objections. Not long ago, for example, the Accreditation Council for Graduate Medical Education ("ACGME") proposed a change in accreditation standards to require teaching hospitals to provide abortion training in their obstetrics and gynecology residency programs. Ultimately Congress intervened to ensure that this requirement will not be used to deny accreditation or federal grants to programs that decline to perform abortions. 42 U.S.C. § 238n. Drawing lessons from this episode, one physician suggested to Congress that the practice of partial birth abortion, if allowed, will in the same way "undoubtedly be used to coerce individuals and institutions to participate in procedures that violate their moral conscience." *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 39 (June 15, 1995) (statement of Pamela Smith, M.D.). The challenged Nebraska statute thus avoids the kind of ethical dilemma in which conscientious physicians and medical educators would likely be placed if a state license to practice medicine were construed to encompass the killing of partly-born children.

Even if Nebraska had prohibited a particular *intra-uterine* abortion procedure, which is not the case here, its prohibition would pass constitutional muster under this Court's precedents. Only once in its history has this Court struck down a ban on a particular method of abortion. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The procedure was saline amniocentesis. Citing testimony that 68% to 80% of all abortions after the first trimester were at that time done through saline amniocentesis, the *Danforth* Court concluded that a ban on the procedure forced women to terminate their pregnancy "by methods more dangerous to [their] health than the method outlawed." 428 U.S. at 77-79.

The distance between the Court's description of saline amniocentesis in 1976 and the medical profession's description of partial birth abortion today is remarkable. A "group of over 400 obstetrician-gynecologists and maternal-fetal specialists have unequivocally stated, 'partial-birth abortion is never medically indicated to protect a woman's health or her fertility. In fact, the opposite is true: The procedure can pose a significant and immediate threat to both the pregnant woman's health and her fertility.'" H.R. Rep. No. 105-24, at 15 (1997), quoting Nancy Romer, M.D., Pamela Smith, M.D., Curtis Cook, M.D., & Joseph DeCook, M.D., "Partial Birth Abortion is Bad Medicine," *Wall Street Journal*, Sept. 19, 1996.

The AMA "could not find *any* identified circumstance in which the [partial birth abortion] procedure was the only safe and effective abortion method." *New York Times*, May 26, 1997 (letter from AMA President Daniel H. Johnson, Jr., M.D., to the editor) (emphasis added). Likewise, a "select panel convened by the American College of Obstetricians and Gynecologists could identify *no* circumstances under which this procedure ... would be the only option to save the life or preserve the health of the woman." American College of Obstetricians and Gynecologists ("ACOG"), Statement of Policy (approved by the Executive Board Jan. 12, 1997, and distributed to ACOG chairs) (emphasis added).

The Nebraska Legislature was informed by a coalition of physicians that "the partial birth [abortion] procedure is never medically necessary." Nebraska Committee on Judiciary, Hearing Transcript at 50, Hearing on LB 23, 167 & 217 (Feb. 12, 1997) (as reported by Senator Kate Witek); *see id.* at 65 ("our former Surgeon General, Dr. C. Everett Koop, and hundreds of other specialists have attested to the fact that 'partial birth abortion is never medically necessary to protect a mother's health or future fertility ... [and that] this procedure can

pose a significant threat to the mother's immediate health and future fertility'").[20]

What abortion practitioners themselves have had to say about partial birth abortion is even more damning. "I would dispute any statement that this is the safest procedure to use," says Warren Hern, author of the nation's most widely used textbook on abortion. Diane M. Gianelli, "Outlawing Abortion Method: Veto-Proof Majority in House Votes to Prohibit Late-Term Procedure," *Am. Med. News* (Nov. 20, 1995) at 3, quoted in H.R. Rep. No. 105-24, at 15 (1997). A Dayton physician who had performed more than 700 partial birth abortions said that of the abortions he performs in the 20- to 24-week range, "probably 20% are for genetic reasons, and the other 80% are purely elective." Diane Gianelli, "Bill Banning Partial-Birth Abortion Goes to Clinton," *Am. Med. News* (Apr. 15, 1996) at 9-10. Claims that partial birth abortion may be necessary for health reasons are also belied by the admission of the very abortion clinics and doctors challenging partial birth abortion bans that they never or rarely perform such abortions. *Richmond Medical Center v. Gilmore*, 144 F.3d 326, 327 (4th Cir. 1998) (granting stay); *Planned Parenthood v. Doyle*, 9 F.Supp.2d 1033, 1045 (W.D. Wis. 1998) (physician challenging Wisconsin's ban had performed 60,000 abortions, but only "one or two" partial birth abortions each year), *rev'd*, 162 F.3d 463 (7th Cir. 1998).

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[20]Congress heard similar testimony. One physician testified that "there are absolutely no obstetrical situations encountered in this country" which would require a partial birth abortion "to preserve the life or health of the mother." *The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 82 (Nov. 17, 1995) (statement of Pamela Smith, M.D.). Another noted that the procedure "offers no advantage in safety" over other methods of abortion. *Id.* at 112 (statement of Nancy G. Romer, M.D.).

Nearly every aspect of the physician-patient relationship is touched by regulation, from training and licensure to a host of prescribed duties, including informed consent, restrictions on advertising, maintenance of patient confidentiality, and so on. Abortion, let alone the killing of partly-born children, is not exempt from such scrutiny and regulation.

It should be recalled that abortion is *a surgical procedure* with consequent medical risks and complications. The Nebraska Legislature heard testimony about these risks from an obstetrician-gynecologist and fellow of the American College of Obstetricians and Gynecologists:

> I think it's important to realize that this procedure asks of us as doctors to do two, at least two, possibly as many as three very, very risky procedures. One is the dilation of the cervix itself manually before it is time for that to occur on its own and that runs a woman's risk up for preterm labor in the future. Also the instrumentation, putting sharp instruments into a woman's uterus blindly runs the risk of uterine perforation. And the very procedure of reaching into a woman's uterus, turning the baby from a head first position to a feet first position is literally ... forbidden by the Williams Obstetrics and Gynecology textbook as being entirely too risky for many different medical complications that occur because of that.

Nebraska Committee on Judiciary, Hearing Transcript at 64, Hearing on LB 23, 167 & 217 (Feb. 12, 1997) (testimony of Paul Hayes, M.D.). *See also* Sprang and Neerhof, *supra* note 2, at 744-45.

Given the rapidity of change in medicine and medical technology, the Court should be especially reluctant to substitute its own judgment for that of the legislature on these questions. The "regulation of the practice of medicine, like regulation of other professions" is a "matter peculiarly within the competence of legislatures...." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 802 (1986) (White, J., dissenting), *overruled in part, Planned Parenthood v. Casey*, 505 U.S. at 870. Legislatures are in a better position than courts to collect information and respond to changes in medical practice and technology. As individual members of this Court have observed, the Court does not sit, and has expressed no desire to sit, as the Nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (plurality opinion), *quoting Planned Parenthood v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in the judgment in part, dissenting in part).[21]

We urge the Court to uphold the Nebraska statute.

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[21]The seemingly endless monitoring and fact-finding that would be necessary were the courts to assume such an inherently legislative function is suggested by Judge Posner's dissent in *Hope Clinic v. Ryan*, 195 F.3d 857, 876 (7th Cir. 1999). He concedes that today the state "may be right" that partial birth abortion is "*never* required to preserve a woman's health" (original emphasis), but speculates that "[t]omorrow, studies may show" otherwise, *id.* at 880, thus inviting the very sort of continuing judicial supervision that is inappropriate to constitutional adjudication.

CONCLUSION

A majority of the American people decry the partial birth abortion procedure. Their response is based on a shared moral sense, one rooted in an understanding of themselves and the sort of society they wish to build for themselves. The reasonable and democratically expressed judgment of ordinary American citizens to prohibit what can only be described as a ghastly practice unworthy of any civilized Nation should not lightly be cast aside. Indeed, the Constitution would seem to require great deference to that judgment.

The *Casey* plurality expressed reservations about how they would have decided the abortion question if that case had been one of first impression. Unlike *Casey*, this *is* a case of first impression. We urge the Court to consider carefully both the conduct involved and the important role of legislatures in drawing conclusions about it. Clarity about what this Court has done in the past and faithfulness to the Constitution require that the Nebraska statute be upheld.

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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